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The Adequate and Independent State Grounds Doctrine: Federalism, Uniformity, Equality and Individual Liberty

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THE ADEQUATE AND INDEPENDENT STATE GROUNDS DOCTRINE: FEDERALISM, UNIFORMITY, EQUALITY AND INDIVIDUAL LIBERTY

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THE CURRENT construction of the adequate state grounds doctrine involves the presumption of Supreme Court jurisdiction over state court cases that are ambiguous as to their grounds of decision. This article explores the judicial history of the doctrine—the principles that brought it into being and those that support its continued existence. First, the basic federalist principles which are significant to both the Supreme Court's current and past formulations of the doctrine are discussed. Then, after pointing out the many conflicts between the Supreme Court's current formulation of the adequate state grounds doctrine and other Supreme Court policies, the author proceeds to explore matters of uniformity and individual liberty and how these concepts traditionally have been treated as almost synonymous, but recently appear to be at odds in many Supreme Court decisions. Ultimately, an argument is made for abandonment of the current approach as an unreasonable construction of the doctrine that results in unreasonable applications. The doctrine's application should be limited to cases of procedural default and procedural adequate state grounds—areas in which the presumption of jurisdiction has not been used frequently.

I. INTRODUCTION: FEDERALIST ORIGINS TO MODERN POLICY

The purpose of this article is to explore the jurisprudential considerations upon which the United States Supreme Court has chosen to build its jurisdictional policies. The discussion focuses on the adequate state grounds doctrine, not because it dominates the constitutional landscape, but because it is so close to the heart of the theories of federalism and uniformity of law that have controlled the Court's recent decisions.

The adequate and independent state grounds doctrine is a jurisdictional rule that grew from roots established in *Murdock v. City of Memphis*.[1] For the first time, that decision outlined the basic rule that

1. 87 U.S. (20 Wall.) 590 (1875). For a case-by-case exposition on the historical development of the substantive adequate state grounds doctrine, see Elison and NettikSimmons, *Federalism and State Constitutions: The New Doctrine of Independent and Adequate State Grounds*, 45 MONT. L. REV. 177 (1984).

if a state court articulates an adequate state ground for its decision, independent of federal law, then the Supreme Court is without jurisdiction.[2] *Murdock* points out that there may be matters sufficiently broad to sustain the state court's judgment independent of federal law.[3] This reflects the federalist principle that state courts are the ultimate arbiters of state law,[4] yielding to the United States Supreme Court only when their interpretations of state law fall beneath the minimal level prescribed by the Federal Constitution.[5] The decision further limits the Supreme Court's jurisdiction to those state court decisions that hold "against" a federal right.[6] To the uninitiated, this assumption would seem to go without saying. The assumption is, however, inaccurate. Other limitations arise from the words indicating that only "erroneously decided" cases are subject to review.[7] Even in those cases holding against a federal right, the Court's power of review is limited to issuing an affirmance if the state court has accurately interpreted federal law.[8] Again, obvious statements of truth have been contradicted by recent Supreme Court decisions.[9] An accurate and complete reading of *Murdock* suggests that when a state court articulates an adequate state ground for its decision, independent of federal law, and simultaneously

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2. *Murdock*, 87 U.S. at 635-36.

3. *Id.* at 635.

4. "[W]e think it equally clear that . . . the Supreme Court, as a court of *appeal* from the State courts, . . . [is] limited to the questions of a Federal character." *Id.* at 631 (emphasis in original). *See also* Whalen v. United States, 445 U.S. 684, 687-88 (1980); Wainwright v. Sykes, 433 U.S. 72, 81 (1977) (more recent decisions articulating the same position).

5. *Murdock*, 87 U.S. at 634. *See also* Hansberry v. Lee, 311 U.S. 32, 40 (1940) ("State courts are free to attach . . . such consequences as they think appropriate under state constitutions and laws, subject only to the requirements of the Constitution of the United States."). There is also a strong argument for the proposition that once adopted by a state court, federal law becomes part of the state's common law and once it is adopted by a state legislature, it becomes part of the state statutory or constitutional law and therefore not subject to Supreme Court review. The Supreme Court has recognized the opposite side of this jurisdictional coin. *See* Grayson v. Harris, 279 U.S. 300, 303 (1929); Joines v. Patterson, 274 U.S. 544 (1927) (state law, once adopted by Congress, becomes federal law together with all the interpretations placed on it by the state courts); *See also* 18 U.S.C. § 13 (1982) (explicitly adopting state law as federal law). However, in the adequate state grounds context, the Court has ignored the idea that federal law can ever become state law by virtue of adoption. *See, e.g.*, South Dakota v. Neville, 459 U.S. 553 (1983) (finding state constitutional provision not sufficiently independent of federal law, and therefore reviewable); Texas v. Brown, 460 U.S. 730 (1983) (finding that state common law had been adopted from federal cases and therefore was reviewable). Such findings are particularly troublesome when a state constitutional provision is at issue, since many state constitutions predate the United States Constitution.

6. *Murdock*, 87 U.S. at 636.

7. *Id.*

8. *Id.*

9. While the Court now has discretion to review decisions in favor of an asserted right, that discretion should be exercised on a very limited basis. For most of history, that has been the case. *See infra* notes 10-13, 139-144 and accompanying text (discussing certiorari jurisdiction).

upholds minimal constitutional standards, the Supreme Court is without jurisdiction. In the usual case, the Court has jurisdiction over state court interpretations of federal rights only when the decision is in *error* and is *against* the asserted right.

The Supreme Court did not conclude independently that these jurisdictional restrictions were necessary. The decision in *Murdock*[10] and other early cases[11] reflected an attempt by the Supreme Court to limit the reach of its appellate jurisdiction consistent with traditional notions of federalism[12] as originally expressed by Congress in the Judiciary Act.[13] The adequate state grounds doctrine was but one of many federalist barriers established between state and federal government to prevent federal authorities from riding roughshod over states determined to remain independent.[14]

When the Constitution was created, the framers had just recently been forced to extreme acts of revolution in order to shed a strong central government. Most were not anxious to see a new one spring up in its place.[15] The framers could not foresee from which branch of government the threat of centralization might arise and, therefore, were equally anxious to limit the power of the federal judiciary along with the other two branches of government. What has come to be known as federalism was simply a series of practical governmental devices designed to prevent the central government from becoming too strong (too central).[16] Limiting the Supreme Court's jurisdiction over the deci-

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10. In spite of changes in the Judiciary Act eliminating language that restricted the Court's jurisdiction, the Court wisely adhered to the view that its jurisdiction did not extend to the areas just discussed; instead, *Murdock* reaffirmed the principles expressed in earlier cases. *See* Fay v. Noia, 372 U.S. 391, 428-29 (1962).

11. Eustis v. Bolles, 150 U.S. 361, 366 (1893) (applying and clarifying the holding of *Murdock*). *See also* Cook County v. Calumet & Chicago Canal Co., 138 U.S. 635, 651 (1891); Maguire v. Tyler, 75 U.S. (8 Wall.) 650, 664-65 (1869); Neilson v. Lagow, 53 U.S. (12 How.) 98, 110 (1851).

12. "[T]he powers . . . lodged in the federal government are as little formidable to those reserved to the individual States, as they are indispensably necessary to accomplish the purposes of the Union." THE FEDERALIST No. 46 (J. Madison), in ANTI-FEDERALISTS VERSUS FEDERALISTS 327 (J. Lewis ed. 1967) [hereinafter THE FEDERALIST No. 46].

13. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-87. Section 25 contained language limiting Supreme Court review of state cases to those decided on federal grounds. The Judiciary Act of 1867 deleted that language. Judiciary Act of 1867, ch. 28, § 2, 14 Stat. 386-87. The Supreme Court currently derives both its appellate and certiorari jurisdiction over state court decisions from 28 U.S.C. § 1257 (1982). The complete text of the statute is reprinted *infra* note 29.

14. *See* THE FEDERALIST No. 46, *supra* note 12.

15. Eldridge Gerry was one of many who feared the new Constitution would lead to a monarchy. *See, e.g.*, Gerry, *Observations by a Columbian Patriot*, in ANTI-FEDERALISTS VERSUS FEDERALISTS 185 (J. Lewis ed. 1967).

16. *See supra* note 12.

sions of state courts was simply one such device.[17] The adequate state grounds doctrine is a tool of federalism; it is a practical expression of the fear of centralized governmental power.

Recognizing that the adequate state grounds doctrine or, for that matter, any of the tools of federalism arise from the fear of centralized government, one must also realize that governmental power, as it relates to the individual citizen, can be centralized just as easily in the state as in the national government.[18] The effect of centralized power on individual citizens is much the same regardless of where the power rests.[19] To avoid what had been so objectionable under the English system—the concentration of power in the hands of one body—the framers devised a tripartite separation of powers at the federal level.[20] However, there remained the danger that power could become concentrated in the hands of a central government. In response to this concern the framers devised a parallel separation of powers; they divided power between the federal government and the states.[21] The dual system[22] of power that emerged was designed to provide individuals with the maximum degree of protection from the possibility that an overbearing government might arise to usurp their freedoms. The revolution was not merely a struggle between competing governments—one seeking to maintain the status quo and the other seeking to grasp new power.[23] Rather, it was an effort by individuals to establish new freedoms that were unattainable under the existing system.[24] The Constitution was created not only to provide for a new system of government, but also to limit that government's ability to interfere with individual rights. The

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17. *See generally* J. FITZGERALD, CONGRESS AND THE SEPARATION OF POWERS (1986) (discussing the many devices that are employed to limit governmental power).

18. Madison noted that devices for dividing governmental power were "inventions of prudence" equally useful in limiting state or federal power. THE FEDERALIST No. 51 (J. Madison), in ANTI-FEDERALISTS VERSUS FEDERALISTS 350 (J. Lewis ed. 1967) [hereinafter THE FEDERALIST No. 51].

19. When a person suffers the loss of a protected right it makes little difference whether the loss was because of state action or federal action; the end result is the same.

20. "The framers believed that if they could divide the national authority into three autonomous branches . . . then these provisions, coupled with the power reserved to the states, would effectively prevent the new central government from achieving ascendancy over its citizens." J. FITZGERALD, *supra* note 17, at 27.

21. *Id.*

22. *See generally* Wisdom, *Foreword: The Ever-Whirling Wheels of American Federalism*, 59 NOTRE DAME L. REV. 1063 (1984).

23. Madison asked the rhetorical question: "[W]as the precious blood of thousands spilt . . . not that the people of America should enjoy peace, liberty, and safety, but that the . . . States . . . might enjoy a certain extent of power?" He compared this to the notion that "people were made for kings, not kings for the people." THE FEDERALIST No. 45 (J. Madison), in ANTI-FEDERALISTS VERSUS FEDERALISTS 317 (J. Lewis ed. 1967) [hereinafter THE FEDERALIST No. 45].

24. *See generally* The Declaration of Independence (U.S. 1776).

threat to individual rights under the English system had not arisen from some outside force but from government itself and so the framers sought to divide and conquer the potential threat. They understood that the ultimate purpose of any government must be to provide for the benefit and protection of its citizens.[25] Under our system, powers are not divided between competing governments (state and federal) and competing branches of government for government's sake alone.[26] Powers are divided under our system of government because division limits the possibility that government will reserve power to itself to the detriment of individual rights.

In recent times, the Supreme Court has concluded that there is an adequate state grounds "problem."[27] While the holding of *Murdock* clearly states the adequate state grounds doctrine, it fails to identify clearly when an adequate state grounds problem arises. This is because for most of our country's history no such problem existed. The problems that now exist are the direct result of cases that have been decided recently.[28]

Few jurisdictional problems can arise in cases decided by a state court solely on the basis of either federal or state law. If a state court holds *against* a federal right, the Supreme Court unquestionably has jurisdiction.[29] It is similarly clear that when a state court enters a deci-

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25. The purpose of distributing governmental powers was to make each office a "check" on the others. "[T]he private interest of every individual" was to be "a sentinel over the public rights." THE FEDERALIST No. 51, *supra* note 12, at 350.

26. "[T]he public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object." THE FEDERALIST No. 45, *supra* note 23, at 317.

27. O'Connor, *Our Judicial Federalism*, 35 CASE W. RES. 1, 5 (1984).

28. See *infra* notes 56-73 and accompanying text.

29. 28 U.S.C. § 1257 (1982) confers Supreme Court jurisdiction over state court decisions as follows:

> § 1257. State courts; appeal; certiorari
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> Final judgments or decrees rendered by highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
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> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Id. See also SUP. CT. R. 10-23 (describing the factors considered by the Court in determining whether or not review should be granted).

sion *in favor* of a federal right, the Supreme Court may take jurisdiction at its discretion.[30] If it is obvious from a state court opinion that the decision was based on adequate state law grounds independent of federal law, then the Court has no jurisdiction.[31]

For the most part, the Court has found a potential for "problems" only when a state court bases its decision on both federal and state grounds, or does not make clear the basis of its decision.[32] Historically, when dealing with a state court opinion ambiguous as to its grounds of decision, the Supreme Court has adhered to the adequate state grounds doctrine as developed in *Murdock* and other early cases.[33] When the record has failed to indicate whether the state court judgment was based on federal or state law, the Court would decline jurisdiction if the state law ground was adequate to support the decision.[34]

While the Court did not handle all adequate state grounds cases precisely in the same manner, it consistently declined to enter a premature decision in any of them. After declining jurisdiction,[35] the Court was free to dispose of these cases in a variety of ways. The controlling rule seems to have been to treat each case by the method deemed most appropriate under the circumstances—giving full consideration to the interests of justice.[36] In some instances, the Court simply dismissed the

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30. 28 U.S.C. § 1257(3) (1982). Even though the Court may exercise certiorari jurisdiction in such cases, until just recently it has seldom done so, finding instead that "[i]t is only where *rights*, in themselves appropriate subjects of judicial cognizance, are being, or [are] about to be, *affected prejudicially*" that there is an interest in the "exertion of the judicial power." Texas v. Interstate Commerce Comm'n. & R.R. Labor Bd., 258 U.S. 158, 162 (1922) (emphasis added). *See infra* notes 139-144 and accompanying text (discussing the development of certiorari jurisdiction).

31. The cases cited *infra* note 34 comprise a selection of decisions spread over this century, all of which support the proposition that the Supreme Court has no jurisdiction over state law. They also demonstrate the variety of treatments the Court has given cases that raise an adequate state grounds question. For an argument that the Supreme Court can and should take jurisdiction over questions of state law, see Matasar & Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291 (1986).

32. O'Connor, *supra* note 27, at 6. Interestingly, the Court only seems to find this combination of factors when the state court is upholding a federal right.

33. *See* Wainwright v. Sykes, 433 U.S. 72, 81 (1977); Fay v. Noia, 372 U.S. 391, 428-29 (1963).

34. *See, e.g.*, Board of Fairfax County v. Allman, 423 U.S. 940 (1975); Illinois v. Hudson, 405 U.S. 965 (1972); Jankovich v. Indiana Toll Rd. Comm'n., 379 U.S. 487, 489 (1965); Durley v. Mayo, 351 U.S. 277, 278 (1956); Minnesota v. National Tea Co., 309 U.S. 551, 554 (1940); Honeyman v. Hanan, 300 U.S. 14, 18 (1937); Enterprise Irrigation Dist. v. Farmers Mut. Canal Co., 243 U.S. 157, 164 (1917); Adams v. Russell, 229 U.S. 353, 358 (1913); Berea College v. Kentucky, 211 U.S. 45, 53 (1908).

35. *See supra* note 34.

36. *See* Herb v. Pitcairn, 324 U.S. 117, 126 (1945) (noting that the Court has altered its approach "where justice seemed to require it").

action.[37] In some cases, it vacated and remanded to the state court,[38] and in others it continued the case while giving the state court an opportunity to clarify the basis of its decision.[39] In still other cases, the Court reviewed the applicable state law in an attempt to ascertain whether the decision rested on state or federal grounds.[40] While this approach has been described pejoratively as an "ad hoc" approach to establishing the presence or absence of the Court's jurisdiction,[41] it should not be considered as such. Rather, it should be viewed as a flexible approach allowing the Court to handle cases that require different remedies.[42] In recent times, Madisonian federalism, carefully designed to provide for the maximum individual liberty and freedom from oppressive government,[43] has given way to neofederalism. The widely quoted discussion of federalism[44] put forward by Justice Black has been adopted as the classical statement of neofederalist policy. Black believed that "the entire country is made up of a Union of Separate state governments, the National Government will fare best if the states . . . are left free to perform their separate functions in their separate ways."[45] Black's comments deserve some consideration.[46]

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37. *See, e.g.*, Lynch v. New York, 293 U.S. 52 (1934); New York v. Atwell, 261 U.S. 590 (1923); Adams v. Russell, 229 U.S. 353 (1913).

38. *See, e.g.*, Minnesota v. National Tea Co., 309 U.S. 551 (1940).

39. *See Herb*, 324 U.S. at 128.

40. *See, e.g.*, Texas v. Brown, 460 U.S. 730 (1983). This particular approach to the adequate state grounds problem seems to have developed in recent years as the Court has strained to find jurisdiction in cases it wishes to decide. It has culminated in the modern formulation of the doctrine. *See infra* notes 57-69 and accompanying text.

41. Michigan v. Long, 463 U.S. 1039 (1983).

42. *See* Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1496 (1987) (while the variety of approaches to the adequate state grounds problem may not have a rational surface appearance, "[a]ll three [approaches taken together] reflect a fairly consistent policy of avoiding jurisdiction based on speculation").

43. *See supra* notes 10-27 and accompanying text.

44. Justice Black's definition is noteworthy because it has been quoted widely by others and has received acceptance among current members of the Supreme Court, albeit with apparently differing interpretations. *Compare* O'Connor, *supra* note 27, at 2-3 *with* Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986).

45. Younger v. Harris, 401 U.S. 37, 44 (1971).

46. Some feel that Black's approach to federalism has been misunderstood and misapplied. Minor Wisdom, senior judge from the United States Court of Appeals for the Fifth Circuit, once stated:

> The New Federalism is not the federalism of the Framers. It would have shocked Madison and Hamilton. John Marshall could not have lived with it. It involves a recognition of states' rights that seems to extend beyond "Our Federalism" of Justice Black. In spite of *Younger*, the New Federalism appears, at least to the writer, out of character for Justice Black, who believed firmly in the doctrine of incorporation as the basis for far-reaching incursions into state law.

Wisdom, *supra* note 22, at 1077.

Judge Wisdom is probably correct. In his famous discussion of federalism, Justice Black

Under the dualistic federalism of Madison, state courts were the first line of defense against incursions into individual liberties. However, if litigants found—for any one of a variety of reasons—that they were unable to obtain a fair hearing in state court, they could opt for the federal system. The two systems acted as checks on each other, much as the three branches of the federal government act as a system of checks and balances.[47] The purpose of maintaining dual avenues of judicial review was to allow the federal courts to keep a watchful eye on state courts. The federal courts acted, if necessary, to insure that state courts adequately protected constitutional rights.[48] The neofederalism expressed by Justice Black in *Younger* and since articulated by the Court in a host of similar decisions consists of the Supreme Court saying to state courts: "we trust you"[49] to adjudicate federal rights fairly; we therefore will not intervene. Madisonian federalism dictated a mutual respect between the federal and state court systems; even though their respective powers were separate they acted concurrently. However, it also recognized that the state and federal court systems often would be acting out of different interests.[50] The word "respect," when spoken in conjunction with federalism, does not connote a chummy relationship.[51] It is often more synonymous with the respect that adversaries have for each other as they strive to achieve independent, and some-

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said:

> The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts . . . .What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments.

Younger, 401 U.S. at 44 (emphasis added).

47. Dissenting in *Younger*, Justice Douglas articulated this more traditional view of federalism by restating the words of Judge Will: "Section 1983 is, therefore, not only an expression of the importance of protecting federal rights from infringement by the states but also, where necessary, the desire to place the national government between the state and its citizens." *Younger*, 401 U.S. at 63. (Douglas, J., dissenting) (quoting Landry v. Daley, 288 F. Supp. 200, 223 (N.D. Ill. 1968)). Justice Douglas understood that the interests of the state and federal courts were not always in harmony. He saw a role for federalism in the Court's decisions only to the extent that it was structured so as to provide the greatest degree of protection to the people.

48. *See, e.g.*, Furman v. Georgia, 408 U.S. 238 (1972); Benton v. Maryland, 395 U.S. 784 (1969); Duncan v. Louisiana, 391 U.S. 145 (1968); Miranda v. Arizona, 384 U.S. 436 (1966); Malloy v. Hogan, 378 U.S. 1 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961); Betts v. Brady, 316 U.S. 455 (1942).

49. *See generally* Laycock, *Federal Interference with State Prosecutions: The Need For Prospective Relief*, 1977 SUP. CT. REV. 193 (explaining the unreasonable assumptions underlying the rule of *Younger v. Harris*).

50. "The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes." THE FEDERALIST No. 46, *supra* note 12, at 322.

51. According to Madison, promoting "opposite and rival interests" infused the new government with the "defect of better motives." THE FEDERALIST No. 51, *supra* note 18, at 350.

times conflicting, goals. True federalist respect is tempered with watchfulness.

Recent decisions articulating the neofederalist position have shut off the opportunity to opt out of the state court system to an alternative avenue of relief. Contrary to true federalism, neofederalism operates under the assumption that the state and federal systems share the same goals and can therefore function in complete harmony. The abstention doctrine is one of the many neofederalist procedural devices developed by the Court to erect a barrier between litigants and federal courts. Collectively these devices act to insulate from federal review many state court decisions that may be in violation of federal rights. When the option of federal review is eliminated, the delicate system of federalist checks and balances developed by the framers is disrupted. Ultimately, individual liberties suffer. In discussing the relationship between the federal and state governments, Madison said, "The adversaries of the Constitution seem to have lost sight of the people altogether in their reasoning on this subject."[52]

Contrary to—but curiously consistent with—policies like the ones developing out of *Younger*, the Court began in the middle 1970s to extend its jurisdictional reach, often finding an absence of state law grounds adequate to prevent it from taking jurisdiction.[53] It was then that "problems" began to develop in the adequate state grounds doctrine. This more expansive jurisdictional policy ultimately led to an embarrassing result in *South Dakota v. Neville*.[54] In *Neville*, the Supreme Court of South Dakota held that introducing evidence of the defendant's refusal to take a sobriety test violated his right against self-incrimination. The decision was based on both the South Dakota State Constitution and the Federal Constitution. The United States Supreme Court assumed jurisdiction in the case, in spite of the fact that it had been decided on an independent and adequate state ground,[55] reversing

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52. THE FEDERALIST No. 46, *supra* note 12, at 322.

53. Kentucky v. Stincer, 107 S. Ct. 2658 (1987) (sixth amendment); Pennsylvania v. Finley, 107 S. Ct. 1990 (1987); Maryland v. Garrison, 107 S. Ct. 1013 (1987) (fourth amendment); Batson v. Kentucky, 476 U.S. 79 (1986); Delaware v. Van Arsdale, 475 U.S. 673 (1986) (sixth amendment); New York v. Class, 475 U.S. 106 (1986) (fourth amendment); Caldwell v. Mississippi, 472 U.S. 320 (1985) (eighth amendment); California v. Carney, 471 U.S. 386 (1985) (fourth amendment); New York v. Quarles, 467 U.S. 649 (1984) (fifth amendment); Florida v. Meyers, 466 U.S. 380 (1984) (fourth amendment); Oliver v. United States, 466 U.S. 170 (1984) (fourth amendment); Colorado v. Nunez, 465 U.S. 324 (1984) (fourth amendment); California v. Ramos, 463 U.S. 992 (1983) (eighth amendment); Michigan v. Long, 463 U.S. 1032 (1983) (fourth amendment).

54. 459 U.S. 553 (1983).

55. State v. Neville, 312 N.W.2d 723 (S.D. 1981), *rev'd*, 459 U.S. 553 (1983). Early in its opinion, after discussing a state statute and two state supreme court decisions, the state court

the state court decision and remanding the case. On remand from the United States Supreme Court, the South Dakota Supreme Court declined to follow the Supreme Court's opinion, reciting instead a statement that its original decision had been based on an independent and adequate state law ground.[56] The outcome of the case was determined by the South Dakota Supreme Court, not by the United States Supreme Court, despite the United States Supreme Court's efforts to the contrary. Following *Neville*, the Court understandably saw the need to clarify its new jurisdictional approach. An opportunity to do so soon arrived (or was brought in especially for the occasion, depending on your point of view).

In *Terry v. Ohio*,[57] the Supreme Court authorized protective searches for weapons based on a police officer's reasonable articulable suspicion. *Michigan v. Long*[58] involved a situation in which police officers extended an ostensibly protective search into the passenger compartment of a car.[59] The Michigan Supreme Court found the search "in this

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held that defendant Neville's treatment by the state had violated his "federal and state constitutional privilege against self-incrimination." *Id.* at 725 (citing U.S. CONST. amend. V; S.D. CONST. art. VI, § 9). The remainder of the opinion appears to be dicta. The Supreme Court, however, was not willing to accept the opinion on its face.

The Court also displayed its short institutional memory. Only a few years earlier in State v. Opperman, 247 N.W.2d 673 (S.D. 1976), the South Dakota Supreme Court had indicated to the United States Supreme Court that it viewed its state constitution as entirely independent of the Federal Constitution: "We have always assumed the independent nature of our state constitution . . . ." *Id.* at 674. The court also noted that it "was under no compulsion to follow the United States Supreme Court in that regard." *Id.* The court then proceeded to grant defendant Opperman greater rights under the state constitution than the United States Supreme Court had been willing to grant him under the Federal Constitution. *Id.* at 674-75. *See* South Dakota v. Opperman, 428 U.S. 364 (1976) (search of defendant Opperman's vehicle was not unreasonable), *rev'g* State v. Opperman, 228 N.W.2d 152 (S.D. 1975), *on remand*, 247 N.W.2d 673 (S.D. 1976).

56. State v. Neville, 346 N.W.2d 425 (S.D. 1984). Noting that the Supreme Court did not read its original opinion as resting on an independent state ground, the court cited *Opperman* for the proposition that it had the power to act independent of the Supreme Court. The court further stated, "While the Supreme Court determined that evidence of an accused's refusal to take a blood test does not infringe upon Fifth Amendment rights, their decision is *not controlling* of our decision herein." *Id.* at 427 (emphasis added). The court then proceeded, as in *Opperman*, to grant the defendant greater rights under the state constitution than the Supreme Court had been willing to under the Federal Constitution. *Id.*

57. 392 U.S. 1 (1968).

58. 463 U.S. 1032 (1983). *Long* is often erroneously considered the case in which the Court established its neofederalist approach to the adequate state grounds question. It is important because it is the first case in which the neofederalist approach is fully articulated. However, the neofederalist approach was evident in a number of cases that preceded *Long*. *See, e.g.*, Delaware v. Prouse, 440 U.S. 648 (1979); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).

59. *Long*, 463 U.S. at 1035-36. It seems doubtful that the search could have been for purposes of self-protection in view of the fact that defendant Long had already left the car and was some distance away.

case" unjustified.[60] Even though the Michigan court's opinion was consistent with then existing interpretations of United States Supreme Court decisions construing the fourth amendment, the Supreme Court took the opportunity to extend the reach of *Terry*-type searches. More significantly, in *Long* the Court chose to expound on its new jurisdictional policy. The Court announced that when faced with a state court decision, ambiguous as to whether or not it was decided on the basis of federal or state law, the Court will presume it has jurisdiction.[61] If the opinion from the state court does not contain a "plain statement"[62] that the case was decided on independent and adequate state grounds, the Court operates under the assumption that the federal question was controlling—whether in fact it was, or not.[63]

The Court is no longer willing to defer to a state court's judgment on questions of state law[64] where a state court's judgment does not fall beneath the federally prescribed minimum.[65] In recent years, the Court has seen fit to alter a number of such state court decisions.[66] The ade-

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60. *Id.* at 1037. This is significant because it indicates that in order to reach its conclusion regarding the fourth amendment, the Supreme Court overturned a state court's factual determination.

61. *Id.* at 1042. The Court actually uses the word "assume." Most commentators feel that there is little difference between assuming jurisdiction and presuming jurisdiction. *See, e.g.*, Althouse, *supra* note 42, at 1493; Seid, *Schizoid Federalism, Supreme Court Power and Inadequate Adequate State Ground Theory:* Michigan v. Long, 18 CREIGHTON L. REV. 1, 10 (1984); Note, Ohio v. Johnson: *The Continuing Demise of the Adequate and Independent State Ground Rule*, 57 U. COLO. L. REV. 395, 396 (1986) (referring to the Court's action in *Long* as a presumption of jurisdiction) [hereinafter Note, Ohio v. Johnson]; Note, *State Constitutions Realigning Federalism: A Special Look At Florida*, 39 U. FLA. L. REV. 733, 749 (1987) [hereinafter Note, *State Constitutions*]. *But see* Schlueter, *Judicial Federalism And Supreme Court Review of State Court Decisions: A Sensible Balance Emerges*, 59 NOTRE DAME L. REV. 1079, 1092 (1984) (arguing that the word presumption is an incorrect portrayal of the Court's policy).

62. *Long*, 463 U.S. at 1042.

63. Cases like *Neville* and *Opperman* clearly indicate that there has been little concern for accuracy in the Court's recent observations on the existence or nonexistence of controlling state law grounds. *See also* California v. Ramos, 463 U.S. 992, 1013 (1983) (holding that the Court would defer to the state on the issue at hand, but reversing the California Supreme Court), *on remand*, 37 Cal. 3d 136, 689 P.2d 430, 207 Cal. Rptr. 800 (1984); Oregon v. Kennedy, 456 U.S. 667, 671 (1982) (stating that the Oregon appellate court's decision rested on federal law, even though it was based in part "on state statutory and constitutional grounds"), *on remand*, 295 Or. 260, 666 P.2d 1316 (1983); Washington v. Chrisman, 455 U.S. 1, 5 n.2 (1982) (since the Washington Supreme Court repeatedly cited United States Supreme Court decisions and made no reference to the applicable Washington statute, its decision was not based on independent state grounds), *on remand*, 100 Wash. 2d 814, 676 P.2d 419 (1984).

64. The curiosity of *Younger* is apparent. On one hand, the Supreme Court is saying that it trusts state courts to decide questions of federal law; on the other hand, in *Long* it is saying that it does not trust state courts to decide questions of either federal *or* state law.

65. Justice Stevens asserted this position in *Long*, 463 U.S. at 1068 (1983) (Stevens, J., dissenting). For the majority response, see *id.* at 1042-43 n.8.

66. *See supra* note 53.

quate state grounds doctrine has been a powerful vehicle for achieving that end.

In spite of rhetoric to the contrary, it is difficult to establish from the record that the current Court is concerned with federalist principles at all. The *results* of cases, as distinguished from the dicta they contain, reflect no particular interest in clarifying the state-federal relationship. Rather, they imply a strong interest in deferring to governmental power.[67] It makes little difference whether it is a federal, state or local government asserting itself over the people.[68] The modern formulation of the adequate state grounds doctrine gives us a different perspective on *Younger v. Harris* and those cases expressing the tenents of neofederalism. The Supreme Court is saying to the state courts, "we trust you,"[69] but like the trust that flows from parent to child, the trust that flows from the Court to the states is paternalistic. Actually, the Court seems to be saying: "We trust you only so long as you do what we want you to do."

The Court's present approach to adequate state grounds cases is inconsistent with the respect accorded state courts under true federalism,[70] the purpose of which was to provide the greatest degree of protection possible to individual rights. Neither is it consistent with the ideals of neofederalism expressed in the ill-advised *Younger* decision.[71] Rather than an expression of trust for state courts, the Supreme Court has articulated a policy that treats state courts as stepchildren. Curiously enough, while antithetical to neofederalist decisions like *Younger* which grant state courts greater freedom, the new adequate state grounds doctrine is consistent with those decisions in its practical result. That is, it acts to the detriment of the individual seeking to assert a constitutional right.[72]

The basic proposition of this Comment is that the Court's present formulation of the adequate state grounds doctrine is ill-advised, that it should be abandoned and that the Court should return to previous

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67. When the Supreme Court uses the adequate state grounds doctrine to narrowly interpret a federal right, all citizens lose their ability to assert that right in all courts: federal, state and local.

68. *See, e.g.*, Shearson/American Express Inc., v. McMahon, 107 S. Ct. 2332 (1987) (deferring to corporate power); United States v. Stanley, 107 S. Ct. 3054, *on remand*, 828 F.2d 1498 (11th Cir. 1987) (deferring to federal power); New Jersey v. T.L.O., 469 U.S. 325 (1985) (deferring to local power); United States v. Leon, 468 U.S. 897 (1984) (deferring to state power).

69. *See generally* Laycock, *supra* note 49.

70. Under true federalism this respect was ultimately derived from the fact that the states are inherently closer to the people than the federal government ever will be. *See generally* THE FEDERALIST No. 45, *supra* note 23.

71. *See generally* Laycock, *supra* note 49.

72. *See supra* notes 46-54 and accompanying text.

methods of handling ambiguously decided cases. A secondary proposition is that the Court should usually refrain from taking jurisdiction over state court decisions that uphold an asserted federal right. Beyond the concerns of federalism there are several other factors that support a change in the Court's current jurisdictional policy.

II. Other Principles and Purposes Underlying the Adequate State Grounds Doctrine

The Court's current neofederalist approach to the adequate state grounds doctrine is not based on a truly federalist motivation; rather, it stands in opposition to the principles of federalism. The original formulation of the adequate state grounds doctrine was solidly based in federalist principles.[73] What, then, are the factors that motivate the Court's present position?

Traditionally, aside from serving the interests of federalism, the adequate state grounds doctrine has served many important purposes. The doctrine has provided a substantial aid to judicial efficiency by limiting access to the Court's crowded docket,[74] and it has provided the Court with the flexibility necessary to deal with varying factual histories and procedural postures of individual cases.[75] Neither of these purposes are served by the neofederalist position. Presuming jurisdiction does not assist docket control,[76] nor does it offer flexibility. Two other justifications have been promoted as foundations for the modern formulation of the adequate state grounds doctrine—the avoidance of unconstitutional advisory opinions and the interest in protecting the uniformity of federal law.

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73. *See supra* notes 1-6 and accompanying text.

74. Chief Justice Rehnquist, a supporter of the Court's new jurisdictional doctrine, has stated in an argument for a new federal appellate court: "The present proliferation of litigation in both state and federal courts throughout the country and the tremendously increased number of undecided federal questions which this litigation raises are presently preventing the Supreme Court from adequately discharging its role . . ." Rehnquist, *The Changing Role Of The Supreme Court*, 14 Fla. St. U.L. Rev. 1, 14 (1986). *See also* Michigan v. Long, 463 U.S. 1032, 1070 (1983) (Stevens, J., dissenting) ("[Our] docket [is] swollen with requests by States to reverse judgments that their courts have rendered in favor of their citizens.").

75. Flexibility is an absolute necessity for a Court concerned with vindicating the rights of individuals. *See Long*, 463 U.S. at 1068 (Stevens, J., dissenting) ("[T]he primary role of [the] Court is to make sure that persons who seek to *vindicate* federal rights have been fairly heard.") (emphasis in original). However, this is not as important for a Court that is primarily concerned with the rights of only 50 individuals (the states), whose institutional interests are much the same.

76. In terms of limiting the number of cases on the docket, presuming jurisdiction does not help. It can, however, serve as a mechanism for insuring that the kinds of cases the Court wants to hear are available for disposition.

A. *The Avoidance of Advisory Opinions*

An important purpose underlying the *original* adequate state grounds doctrine has been the avoidance of unconstitutional advisory opinions. It has also been asserted as a basis for the neofederalist version of that doctrine.[77] It is well established that the Supreme Court does not have jurisdiction to decide questions of state law.[78] What happens, then, when the Supreme Court takes jurisdiction over a state court decision—as it did in *Long* and has in many later cases—operating under a presumption that the case was decided on federal grounds? If the case was originally decided on state grounds and the state court, following Supreme Court review, enters a final decision contrary to that of the Supreme Court, has the Supreme Court entered an advisory opinion? In order to answer this question the term "advisory opinion" must first be defined.[79]

The ban on advisory opinions derives from the article III case or controversy requirement.[80] The framers included this requirement to effectuate their intent that the Supreme Court not be a general expositor of public policy. The Court was not to be "in the business of emitting free-floating legal advice,"[81] but rather was to be the ultimate decider of cases and controversies. A leading case on the subject, *Muskrat v. U.S.*,[82] established several criteria useful in defining "advisory opinion." In *Muskrat*, the Court stated that the exercise of power to make constitutional decisions "is legitimate only in the last resort, and as a necessity in the *determination* of real, earnest and vital controvers[ies]."[83] While many other factors can influence the rendering of an

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77. Justice Stevens eloquently addressed this assertion when he said: "I am thoroughly baffled by the Court's suggestion that it must stretch its jurisdiction and reverse the judgment[s] of [State] Supreme Court[s] in order to show '[r]espect for the independence of state courts.'" *Long*, 463 U.S. at 1072 (Stevens, J., dissenting) (quoting *ante* at 1040).

78. *See* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875).

79. The principle that the Supreme Court can not render advisory opinions was originally stated in Hayburn's Case, 2 U.S. (2 Dal.) 409, 410 (1792); *See also* Muskrat v. United States, 219 U.S. 346 (1911) (discussing *Hayburn*).

80. U.S. CONST. art. III, § 2. *See, e.g.*, GTE Sylvania, Inc. v. Consumers Union, 445 U.S. 375, 382-83 (1980); North Carolina v. Rice, 404 U.S. 244, 246 (1971); Flast v. Cohen, 392 U.S. 83, 96 (1968); Liner v. Jafco Inc., 375 U.S. 301, 306 n.3 (1964); Massachusetts v. Mellon, 262 U.S. 447, 480 (1923). In these cases the United States Supreme Court addressed the issue of case and controversy and the effect of mootness on federal jurisdiction.

81. *See* Althouse, *supra* note 42, at 1492.

82. 219 U.S. 346 (1911).

83. *Id.* at 359 (quoting Chicago & Grand Trunk Ry. Co. v. Wellman, 143 U.S. 339, 345 (1892)) (emphasis added). The Court further states, "Judicial power . . . is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." *Id.* at 356 (quoting S.F. Miller, *The Judicial Power of the United States*, in LECTURES ON THE CONSTITUTION OF THE UNITED STATES 314 (1891)).

advisory opinion,[84] emphasis here is on words indicating that, to avoid rendering an advisory opinion, the Court's interest should be in "determining" the outcome of cases. Since the Court instituted its policy of presuming jurisdiction over ambiguous state court decisions, there have been several instances where the Supreme Court decision has not determined the outcome.[85] In every ambiguously decided case in which the Court has presumed jurisdiction, it has been within the power of the state court on remand to control the outcome of the case simply by stating that its original decision rested on independent and adequate state grounds.[86] In most instances where the Supreme Court has presumed jurisdiction over a case that was ambiguously decided, the state court has deferred to the Supreme Court judgment and entered a decision consistent with it.[87] However, state courts are not required to do so. In other instances, state courts have been unwilling to accept the Supreme Court's *advice* and have *reversed*[88] the Court's decisions, basing their final decisions on state grounds and indicating that they had done so in their original decisions.[89]

The reasoning that leads to the conclusion that the Court should only involve itself in cases it can decide also leads to the conclusion that when it fails to do so, the Court risks entering an advisory opinion. Arguably, the Court enters an advisory opinion in every such case, with state courts choosing to follow its *advice* in some instances but not in others. Those cases in which the state court chooses not to follow the Supreme Court's *advice* serve as evidence that all such opinions are advisory. The Court has indicated that an opinion which would subject the Court's decision to "consideration and suspension" by an outside body would amount to an advisory opinion.[90] The Court strongly main-

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84. One such factor is the lack of adversity between the parties. Friendly or collusive suits present the best example of this situation. *See* Lord v. Veazie, 49 U.S. (8 How.) 251 (1850).

85. *See, e.g.*, California v. Ramos, 463 U.S. 992 (1983); South Dakota v. Neville, 459 U.S. 553 (1983).

86. *See* State v. Neville, 346 N.W.2d 425 (S.D. 1984). The Supreme Court has established that state courts can maintain the independence of their decisions and avoid Supreme Court review by making a simple statement to this effect. It is unclear why the contemporary Court refuses to recognize that such a statement made on remand following Supreme Court review is equally effective to maintain the independence of the state court decision—nullifying any Supreme Court influence in the case.

87. *See, e.g.*, Ohio v. Johnson, 467 U.S. 493 (1984); Michigan v. Long, 463 U.S. 1032 (1983).

88. *See* Note, Ohio v. Johnson, *supra* note 61, at 409 ("few state courts are willing to take the bold step of 'reversing' a decree of the United States Supreme Court"). *See also* Robson & Mello, *Ariadne's Provisions For Returning Alive From the Labyrinth of Federalism*, 76 CALIF. L. REV. 89, 122-23 (1988).

89. *See supra* note 63.

90. Muskrat v. United States, 219 U.S. 346, 352-53 (1911) (quoting Hayburn's Case, 2 U.S. (2 Dal.) 409 (1792)).

tains that its decisions should be final and not subject to review.[91] Clearly, in cases like those discussed above, the Court's decision is not "final."[92] Even in those cases in which the state court agrees with the Supreme Court, on remand it is the state court that controls the outcome by submitting the Supreme Court's decision to "consideration and suspension" until it enters the "final" decision in the case. The distinction between cases that are based on an adequate state ground and the usual remand is that in the typical case remanded to another court, the Supreme Court *has the power* to enter the final decision, but voluntarily surrenders that authority to the lower court. When the Supreme Court takes jurisdiction in a case like *Neville*, which was decided on an independent and adequate state ground, the Court does not, and cannot voluntarily relinquish control over the case's outcome. When a case is decided on an adequate state ground, the Supreme Court has no control over its outcome because it has no jurisdiction[93] and, therefore, no control to relinquish to the state court.

When the Supreme Court presumes jurisdiction over a state court case decided on ambiguous grounds, it trusts the state court to accept its *advice*. Whether the state court accepts the offered *advice* or not, the Court's expositions on federal law in such a case are merely advisory since they are not determinative of the case's outcome.

Explaining the purpose of the adequate state grounds doctrine, the Court in *Herb v. Pitcairn*[94] stated:

> [O]ur power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.[95]

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91. *Id.* at 352-53.

92. *Id.*

93. The definition of jurisdiction is *power*. *See supra* note 83. The Supreme Court by virtue of the supremacy clause has the power to call up a case like *Neville* for review. In that sense, it has jurisdiction. But it does not have the *power to decide* cases like *Neville*. In that sense, it has no jurisdiction. The assertion of this Comment is that the power to enter binding decisions constitutes jurisdiction, not the power to talk.

> The question involved relates to the effect of the proceedings had in a court wholly incompetent to render a valid judgment, because if the judgment to be rendered would be void it necessarily follows the preliminary proceedings of the court, necessary to rendition of judgment, must likewise be void. If the court has no jurisdiction of the subject matter for judgment there can be no jurisdiction giving effect to process or pleadings.

Herb v. Pitcairn, 324 U.S. 117, 122 n.2 (1945).

94. 324 U.S. 117 (1945).

95. *Id.* at 126.

It seems clear that the precise result predicted in *Herb* has occurred. Until the Court either decides to alter its present approach to ambiguously decided cases or is embarrassed into doing so by a state court, its opinions in adequate state grounds cases will be regarded by many as merely advisory.[96] Amazingly, the majority has cited the language in *Herb* on a regular basis in a transparent attempt to persuade skeptical critics that it has adhered to the legal principles involved in that case.[97] "A legal fiction is an assumption by the law that a statement is true when everybody knows it to be false."[98] Too many commentators remain unpersuaded that the Court does not render advisory opinions under the current adequate state grounds doctrine for the idea to pass even as a legal fiction.[99] Prior to the *Long* decision, the Court seldom saw the need to express its concern over the possibility of rendering an advisory opinion in the context of an adequate state grounds question. As the Court noted in *Herb*, the avoidance of advisory opinions is the obvious basis for the doctrine and has seldom been considered to require comment by the Court.[100]

In other contexts, the remotest possibility that the Court might render an advisory opinion has controlled its disposition of the case. Curiously enough, *Younger* abstention is one of the areas in which the Court has expressed this concern. In *Pennzoil Co. v. Texaco, Inc.*[101] the Court stated:

> Another important reason for [*Younger*] abstention is to avoid unwarranted determination of federal constitutional questions. When federal courts interpret state statutes in a way that raises federal constitutional questions, "a constitutional determination is predicated on a reading of the statute that is not binding on state courts and may

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96. *See* South Dakota v. Neville, 459 U.S. 553 (1983). It has recently been argued that the Court's decisions are binding only on the parties to a given case and only with regard to the facts of that case. In view of such attacks it seems unwise for the Court to enter advisory opinions that are subject to attack on the grounds that they do not even bind the parties to the suit. *See* Meese, *The Law of the Constitution,* 61 TULANE L. REV. 979, 987 (1987).

97. Michigan v. Long, 463 U.S. 1032 (1983); Florida v. Meyers, 466 U.S. 380 (1984).

98. H. WILCOX, FALLACIES OF THE LAW 88 (1907).

99. *See, e.g.*, Althouse, *supra* note 42, at 1506; Elison and NettikSimmons, *supra* note 1, at 200; Seid, *supra* note 61, at 26; Welsh, *Reconsidering The Constitutional Relationship Between State and Federal Courts: A Critique of* Michigan v. Long, 59 NOTRE DAME L. REV. 1118, 1140 (1984); Note, Ohio v. Johnson, *supra* note 61, at 416; Note, *State Law Independence and The Adequate and Independent State Grounds Doctrine After* Michigan v. Long, 62 WASH. U.L.Q. 547, 568 (1984). *Contra* Schlueter, *supra* note 61, at 1101; Matasar & Bruch, *supra* note 31, at 570.

100. Herb v. Pitcairn, 324 U.S. 117, 125 (1945).

101. 107 S. Ct. 1519 (1987).

> be discredited at any time—thus essentially rendering the federal-court decision advisory and the litigation underlying it meaningless."[102]

From the Supreme Court's perspective it is easy to see why, in some contexts, the danger of entering an advisory opinion should be a significant consideration. The Court reasons that the ban on advisory opinions is required by the supremacy clause of the Constitution.[103] Constitutional violations on the part of the Court, designated as the ultimate arbiter of constitutional questions,[104] are indeed disconcerting and unseemly. It is unclear why the Court applies the case or controversy clause so stringently in some situations and ignores it in others. How can the Court logically find the abstention doctrine is required by article III—because of the danger of advisory opinions—while disregarding advisory opinions that occur in the adequate state grounds context? What distinguishes an advisory opinion in an adequate state grounds setting from the possibility of an advisory opinion in any other context?

In most situations where the Court has found circumstances that dictate against assuming jurisdiction because of the danger of an advisory opinion, the Court is called on to vindicate a federal right.[105] Application of the ban on advisory opinions eliminates the possibility of doing so. When the Court presumes jurisdiction over an ambiguously decided criminal case there is no opportunity to vindicate an individual right. The defendants in these cases were winners at the state court level.[106] These cases present only an opportunity either to narrow or eliminate federal rights, since the Court cannot assist the defendants by taking jurisdiction.

B. The Interest In Uniformity

Today's Supreme Court cites the interest in promoting uniformity of federal law[107] as the rationale behind its assuming jurisdiction over am-

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102. *Id.* at 1526 (quoting Moore v. Sims, 442 U.S. 415, 428 (1979)).

103. *See supra* note 80 and accompanying text. *See also* Michigan v. Long, 463 U.S. 1032, 1042 (1983) (citing Herb v. Pitcairn, 324 U.S. 117, 125 (1945)).

104. *See* U.S. CONST. art VI, cl. 2.

105. Opportunities to narrow the scope of federal rights are not presented in these cases except, of course, the right of access to the courts.

106. *See infra* notes 149-52 and accompanying text.

107. *Long*, 463 U.S. at 1039. The Court described its previous methods of handling cases under the adequate state grounds doctrine as "antithetical to the *doctrinal consistency* that is required when sensitive issues of federal-state relations are involved. . . . [W]e therefore determine that it is appropriate to reexamine our treatment of this jurisdictional issue in order to achieve the *consistency* that is necessary." *Id.* (emphasis added). Finally the Court stated that

biguous state court decisions involving what it considers to be erroneous interpretations of federal law. As a justification for presuming jurisdiction over ambiguously decided cases, uniformity—like the Court's other justifications for its approach to adequate state grounds cases—is at odds with other neofederalist policies. Uniformity of federal law is, in appropriate situations, an admirable goal. The principle behind uniformity of law is equal protection of the laws. Justice O'Connor, who has authored many of the Court's adequate state grounds opinions, has stated:

> These basic facts about our judicial federalism indicate the need for some means to assure a consistent and uniform body of federal law .... The goal of national uniformity rests on a fundamental principle: that a single sovereign's laws should be applied equally to all—a principle expressed by the phrase, "Equal Justice Under Law," inscribed over the great doors to the United States Supreme Court.[108]

Uniformity of law encompasses the idea that one person should not suffer a greater burden under the law than another[109] simply because

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dismissal of such cases is inappropriate

> because it cannot be doubted that there is an important need for uniformity of federal law, and that this need goes unsatisfied when we fail to review an opinion that rests primarily upon federal grounds and where the *independence* of an alleged state ground is not apparent from the four corners of the opinion.

Id. at 1040.

108. O'Connor, *supra* note 27, at 4. This principle is widely accepted. The California State Constitution contained a provision that read in pertinent part: "All laws of a general nature shall have a uniform operation." CAL CONST. OF 1849, art. I, § 11. Not surprisingly, this provision was interpreted by the California Supreme Court as an equal protection provision. *See* Department of Mental Hygiene v. McGilvery, 50 Cal. 2d 742, 754, 329 P.2d 689, 699 (1958); Lelande v. Lowery, 26 Cal. 2d 224, 232, 157 P.2d 639, 645 (1945); San Bernadino v. Way, 18 Cal. 2d 647, 658, 117 P.2d 354, 361 (1941). This definition of the meaning of the California uniformity provision was, of course, accepted by the United States Supreme Court. *See* Department of Mental Hygiene v. Kirchner, 380 U.S. 194 (1965). *See also* National Tea Co. v. State, 205 Minn. 443, 286 N.W. 360 (1939), *vacated*, 309 U.S. 551 (stating that the Minnesota Supreme Court had erroneously attempted to base its decision on the fourteenth amendment), *reinstated*, 208 Minn. 607, 294 N.W. 230 (1940) (interpreting MINN. CONST. art. 10, § 1, which stated that "taxes shall be *uniform* upon the same class of subjects," as the equivalent of an equal protection provision) (emphasis added).

109. In Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347-48 (1816), the Court stated:

> A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of uniformity of decisions throughout the whole United States . . . There is an additional consideration, which is entitled to great weight. The constitution of the United States was designed for the common and equal benefit of all the people of the United States.

that person lives in a different state,[110] or for some other irrational reason.[111] The neofederalist adequate state grounds doctrine perverts that principle. Rather than lifting everyone to the same level, as does the true principle of uniformity, the neo-federalist adequate state grounds doctrine seeks to bring everyone down to the same level, so that all rights suffer equally from the same lack of protection.

In the context of inadequate state grounds decisions, the Court has encouraged state experimentation and independence from federal law. When litigants raise claims involving state "experiments" that have run afoul of the Constitution, their access to the federal courts is limited by a wide range of neofederalist procedural devices.[112] This contrasts with the typical adequate state grounds case which usually involves the upholding of an asserted federal right by a state court. In that situation, rather than limiting access to the federal courts, the Supreme Court assumes it has jurisdiction and reverses the state court decision—or at least tries to persuade the state court to do so.

Oddly enough, while the Court asserts uniformity as the basis for the adequate state grounds doctrine, the doctrine itself is not applied in a uniform fashion. The adequate state grounds doctrine, like federalism, actually exists in a strange dualistic form. This article focuses on the substantive adequate state grounds doctrine. As a doctrine, it attempts to answer the question: when is *substantive* state law of such sufficient importance to a decision that it bars Supreme Court review? There is also a procedural adequate state grounds doctrine[113] which is only peripherally a subject of this article. This procedural branch of the adequate state grounds doctrine is commonly referred to as *procedural default*.[114] The reference to default means what it implies; that the per-

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110. "Judges . . . in different states, might differently interpret . . . the constitution itself: if there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity . . . the constitution of the United States would be different, in different states . . ." *Id.* at 348.

111. "The public mischiefs that would attend such a state of things would be truly deplorable . . . . The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of . . . plaintiffs . . . but also for the protection of defendants . . . ." *Id.*

112. The abstention doctrine enunciated in Younger v. Harris, 401 U.S. 37 (1971), is one such device.

113. *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72 (1977); Henry v. Mississippi, 379 U.S. 443 (1965); Fay v. Noia, 372 U.S. 391 (1963).

114. Technically, the procedural strand of the adequate state grounds doctrine involves only cases on direct review to the Supreme Court. Procedural default involves cases in the lower federal courts. These cases, like the adequate state grounds cases, usually begin in state courts. However, it is possible for a federal defendant to be in procedural default. In any case, the issue presented in both procedural default and the procedural strand of the adequate state grounds doctrine is the same: when will a failure to comply with a procedural rule bar further review in the federal courts? Since this article advocates melding the two doctrines, they are referred to interchangeably.

son in default *loses*. The procedural adequate state grounds doctrine attempts to answer the question: when will a party be blocked from federal review[115] by its failure to comply with a state rule of procedure?[116] The Court has answered the first question by presuming jurisdiction on behalf of state prosecutors who are attempting to deny a federal right. It has answered the second question by denying jurisdiction where an individual is seeking to have a federal right protected. Under the procedural adequate state grounds doctrine the Court has found that the interest in preserving a state procedural rule can outweigh the fact that a federal right has been denied—even though the result is non-uniformity of federal rights.[117] Thus rights may be *denied* even though the result is non-uniformity. On the other hand, the Supreme Court has found that state courts should *grant* federal rights only when they are in uniformity with Supreme Court opinions. Why is uniformity important to the Court when the states extend broad rights under the Federal Constitution, but not important when federal rights are being denied?[118] The answer lies in the practical results obtained under both doctrines—the denial of individual liberties.

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115. While this is important in other contexts, the substantive adequate state grounds doctrine is most visible in cases that involve direct review by the Supreme Court of state court decisions. Unlike the substantive adequate state grounds doctrine, procedural default is most commonly encountered in the lower federal courts.

116. A close relative of the procedural adequate state grounds doctrine is the collateral bar rule which applies in both procedural and substantive circumstances. The effect of the collateral bar rule is to deny the right to raise constitutional issues in federal court where the litigant has deliberately failed to comply with a court order and is charged with criminal contempt. *See* Walker v. City of Birmingham, 388 U.S. 307 (1967). This rule is primarily based on the belief that if litigants fail to comply with court orders there can be no rule of law. Thus, it is distinguishable from the procedural adequate state grounds doctrine in that it has a sound theoretical basis. The rule from Fay v. Noia, 372 U.S. 391, 438 (1963), that relief could only be denied if the defendant had "deliberately by-passed" a state procedural rule, is very close to the collateral bar rule. *But see* Wainwright v. Sykes, 433 U.S. 72 (1977) (applying a cause and prejudice test).

117. Claims of procedural default—that a claim should be barred from federal review because of an adequate and independent state procedural ground—are presented by state officials to attack federal court jurisdiction collaterally. In criminal cases, the state official in question is the state prosecutor. In this situation the Court does not presume jurisdiction. After an initial showing by the prosecutor that the state has adequate and independent interests in requiring compliance with its procedural rule, the burden shifts to the criminal defendant to show "cause for the noncompliance and some showing of actual prejudice resulting from the alleged constitutional violation." Wainwright v. Sykes, 433 U.S. 72, 84 (1977). "The adequacy of such an independent state procedural ground . . . has been treated very differently than where the state-law ground is substantive." *Id.* at 82. In the substantive area the prosecutor who has lost in state court raises the adequate state grounds doctrine. In those cases the Court presumes jurisdiction. *See* Michigan v. Long, 463 U.S. 1032 (1983). So much for uniformity.

118. *See* Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928). "The governmental power to interfere . . . with . . . rights . . . is not unlimited, and . . . [a] restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare." *Id.*

III. DEMOCRACY, UNIFORMITY, AND INDIVIDUAL RIGHTS

To some extent, the concepts of federalism, democracy and uniformity of law are intertwined in the adequate state grounds area and cannot be viewed independently. The concept of federalism raises the question of what rights legitimately belong to the states, as opposed to the federal government, and to *any* government as opposed to the people. Under a democratic system of government "by the people," the various governments—federal, state or local—have *rights* only insofar as they seek to act on behalf of their respective citizens.[119]

The governmental interest in uniformity of federal law is a legitimate the government's and powerful interest, stemming from constitutional responsibility to provide the citizenry with equal protection of the laws. When any branch or level of government acts to provide its citizens with equal protection, it acts under a constitutional duty vested in the government by the citizenry. Therefore, the citizenry are the source and ultimate repository of that *right*; and the government's right is characterized more appropriately as a *responsibility*.[120]

An additional right that, appropriately or not, has been characterized as a *state's right* is the police power.[121] The state acts under its police power to provide for the health, safety and welfare of its citizens.[122] Again, this is not a right that stands independent of the people; rather, it exists only when the state acts with their consent—given legislatively—and on their behalf. Police power, therefore, can be viewed more appropriately as a responsibility, much in the same way that equal protection can be viewed as a responsibility.[123]

Viewed from this perspective, only one set of circumstances where the interest in uniformity of law (equal protection of the law) legitimately justifies taking jurisdiction over state court decisions that do not hold against an asserted federal right. That situation is when the state legislature or other state agency, acting on legislative authority, has acted under its police power to protect the health, safety, and welfare

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119. *See* Nebbia v. New York, 291 U.S. 502, 533 (1934). It is only when property or activity is "affected with a public interest" that it becomes "subject to . . . the police power." *Id.*

120. "[I]t is not only the right, but the . . . solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends . . . ." *Id.* at 523 (quoting New York v. Miln, 36 U.S. (11 Pet.) 102, 139 (1837)).

121. *Id.* It is interesting to note that while state police power is well-documented in judge made case law, it has no explicit basis in the Constitution.

122. *See, e.g.*, Pennsylvania Central Trans. Co. v. New York, 438 U.S. 104 (1978); Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310 (1940); *Nebbia*, 291 U.S. 502 (1934); Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928); Thomas Cusack Co. v. Chicago, 242 U.S. 526 (1917).

123. *See supra* notes 107-11 and accompanying text.

of its citizens, and a state court has invalidated the state action through a misinterpretation of federal law.

There is a foreseeable argument that this is precisely what the Supreme Court does under the neofederalist version of the adequate state grounds doctrine. The Court takes jurisdiction over criminal cases on behalf of states which exercise their police power in the form of prosecutions. The Court acts to "assist" the state prosecutors' efforts to protect the health, safety and welfare of the citizenry by helping the prosecutor keep criminals off the streets. This argument, however, assumes that a Supreme Court acting as assistant state prosecutor is a desirable objective.

The Court's approach to what it describes as uniformity under the adequate state grounds doctrine is antithetical to the interests of true federalism. It is an interest not in assisting the state but in asserting federal control over the state police power;[124] in that sense it is at odds even with neofederalism. In such an instance, the Court's policy places direct limitations on the application of the Constitution to the lives of individuals. Rather than assisting the states in doing so, the Court steps into cases where the states clearly do not want to limit individual rights and requires the states to impose limitations.

Consistent with the principles outlined, the Court should take jurisdiction over ambiguously decided cases only when the state court has mistakenly upheld an asserted federal right against the state's attempt to provide for its citizens.[125] Under these circumstances, the Supreme Court should examine the state court decision under general equal protection principles.[126] The Court's interest in uniformity of law properly lies in vindicating the equal protection interest of persons who would normally benefit from states' attempts to provide for their health, safety or welfare had it not been for the inappropriate intervention of state courts.[127]

In most instances where the state action involves only general social or economic legislation,[128] the Supreme Court should uphold the state action so long as there is a rational relationship between the state's goal and its course of action. In such instances, the Court legitimately could exercise its certiorari jurisdiction, ultimately holding against the as-

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124. *See* Note, Ohio v. Johnson, *supra* note 61, at 410.

125. This is precisely what happened in Ives v. South Buffalo, 201 N.Y. 271, 94 N.E. 431 (1911).

126. *See generally* City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (discussion of equal protection principles).

127. *Ives*, 201 N.Y. 271, 94 N.E. 431, for example, involved a state workmen's compensation law.

128. *See, e.g., Cleburne*, 473 U.S. 432.

serted federal right and in favor of the citizenry's right to uniform treatment under the law (equal protection).[129]

Until 1914, the Court had no jurisdiction over state court decisions holding in favor of an asserted federal right.[130] *Ives v. South Buffalo*[131] persuaded Congress of the Court's need for certiorari jurisdiction over state court decisions. This case involved a situation in which the state court struck down a far-reaching piece of social welfare legislation intended to benefit large numbers of people,[132] ruling in favor of a property interest asserted as a federal constitutional right.[133] Since the state court decision was in favor of the asserted federal right, there was no possibility of Supreme Court review.[134] The need for uniformity of federal law is the sole basis for Supreme Court certiorari jurisdiction over state court decisions.[135] This important concern continues today; there is always the possibility of an *Ives* type decision. For example, if a state court were to hold incorrectly that affirmative action programs are per se unconstitutional as violative of the fourteenth amendment,[136] or that a state workmen's compensation program is an unconstitutional taking of property,[137] then the equal protection right to uniformity of law would be violated. Occasionally, in such cases it may be most appropriate for the Supreme Court to exercise discretion and delay jurisdiction if the erroneous decision is subject to immediate revision by forces within the state.[138] The true spirit of comity dictates merely that there be

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129. *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc., v. United States, 379 U.S. 241 (1964). Both are examples of situations in which the Court held against an asserted constitutional right in favor of equal protection principles.

130. P. BATOR, D. SHAPIRO, P. MISHKIN & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 440 (2d ed. 1973).

131. 201 N.Y. 271, 94 N.E. 431 (1911).

132. *Ives*, 201 N.Y. at 273, 94 N.E. at 433.

133. *Id. See also* U.S. CONST. amend. XIV, § 1, which states in pertinent part: "[N]or shall any State deprive any person of life, liberty, or *property*, without due process of law." (emphasis added).

134. The Supreme Court did not have certiorari jurisdiction over state court decisions until 1914. It is only under certiorari, not on appeal, that the court can take jurisdiction when the state court decides in favor of an asserted federal right.

135. The Court was without certiorari jurisdiction for many years. But for cases such as Ives v. South Buffalo, 201 N.Y. 271, 94 N.E. 431 (1911), that present uniformity problems, there will always be no need for certiorari jurisdiction.

136. While such programs *can* violate equal protection principles under certain circumstances, see University of California v. Bakke, 438 U.S. 265 (1978), they are not by any means per se unconstitutional.

137. *See Ives*, 201 N.Y. 271, 94 N.E. 431.

138. The ultimate result of *Ives* provides a good example of such a development. Following the decision in *Ives*, New York adopted a state constitutional amendment barring any construction by the courts of the state constitution that would "limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees." N.Y. CONST. of 1894, art. I, § 19 (1913) (current version at N.Y. CONST. art. I, § 18).

courteous relations between the federal and state governments. Comity does not dictate the sacrifice of individual liberties that seems to be required by neofederalism.[139] Comity is only one small aspect of true dualistic federalism. When no evidence indicates that the state will take *quick* action to vindicate the equal protection injury, the federal courts must be prepared to step in and fill the breach. It is important for the Supreme Court to take jurisdiction over such cases because of the individual rights at stake; certiorari jurisdiction was created for that reason.

Conversely, when a state court chooses to extend greater constitutional protections to a criminal defendant than provided by the United States Supreme Court, no such interest exists.[140] There is no denial of equal protection. Without an interest in equal protection, there is no interest in uniformity.[141] On the other hand, it is arguable that the criminal defendant is denied equal protection under the neofederalist adequate state grounds doctrine, since the Supreme Court applies its presumption of jurisdiction on a selective basis.

When the Supreme Court takes jurisdiction over an ambiguous state court decision in which the state court has granted more extensive rights to a criminal defendant than the Supreme Court would prefer,[142] the Court protects the interests of the state prosecutor. Acting under state authority as a state officer, a prosecutor has no equal protection right and, therefore, no interest in uniform application of the law. The fourteenth amendment was intended to act as a direct limitation on state authority.[143] Therefore, the notion that the spirit driving the amendment (equal protection) should be applied to augment assertions of state power over individuals is ludicrous.

A. The Impact of the Court's Current Policy

A review of the scope of the Supreme Court's jurisdiction over state court cases is helpful in understanding the impact of the Court's policy

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139. *See* Fay v. Noia, 372 U.S. 391, 437 (1963) (noting that "the needs of comity are adequately served in other ways"). *See also* Laycock, *supra* note 49.

140. *See* California v. Ramos, 463 U.S. 992, 1030 (1983) (Stevens, J., dissenting). "[W]hat harm would have been done to the administration of justice by state courts, if the California court had been left undisturbed in its determination." *Id.*

141. *Id.* This assumes, of course, and not unreasonably, that the terms equal protection and uniformity are synonymous.

142. *See, e.g., supra* note 117 and accompanying text.

143. *See* U.S. CONST. amend. XIV. The words "no state shall" speak for themselves. *See* Monroe v. Pape, 365 U.S. 167 (1961); Mitchum v. Foster, 407 U.S. 225 (1972) (discussing the legislative history of the fourteenth amendment and the reconstruction era civil rights statutes). That the fourteenth amendment and the reconstruction statutes were intended to be a "transformation from the concepts of federalism" to provide even broader rights than Madison envisioned has been ignored by the current Court. *Id.* at 242.

concerning the adequate state grounds doctrine. Under the Judiciary Act,[144] the Supreme Court has jurisdiction over all cases in which the state court upholds a state action against an asserted federal right.[145] Thus, a state criminal defendant,[146] or a litigant attempting to sue the state for damages or injunction[147] has no use for the Court's presumption of jurisdiction. As long as these parties assert a federal right and that right is denied, they have the right of review in the United States Supreme Court.[148] Should the Court find that the state has acted beneath the constitutionally prescribed minimum level, it is bound by the supremacy clause to reverse the state court decision.[149] These rules hold true as long as a federal right is asserted, regardless of whether the state court decision is ambiguous.

Thus far, the examination of cases in which the state court clearly decided against a federal right has shown that the person asserting that right has no use for the Court's presumption of jurisdiction. But what about persons who assert a federal right and win in state court? Prior to recent changes in court policy, the Supreme Court rarely showed any interest in such cases, even when a decision was based explicitly and solely on a federal ground.[150] More importantly, if the state court held for the criminal defendant on the basis of both a federal right and a state right, or did not make clear the grounds for its decision, the Supreme Court refused to review the case on the basis that an independent and adequate state ground could control the decision.[151]

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144. *See supra* note 29.

145. 28 U.S.C. § 1257(1), (2) (1983).

146. Typically, the doctrine has been applied only against criminal defendants. *See* Capital Cities Media, Inc. v. Toole, 466 U.S. 378 (1984), a noncriminal case in which the Court declined to follow the neofederalist approach. The Court instead vacated and remanded, citing California v. Krivda, 409 U.S. 33 (1972). *See also* Philadelphia Newspapers Inc. v. Jerome, 434 U.S. 241 (1978). *But see* New York v. P.J. Video Inc., 475 U.S. 868 (1986) (extending the doctrine to quasi-criminal cases).

147. While the doctrine has not been extended thus far to this context, it could be in the future. *See* Pennzoil v. Texaco, 107 S. Ct. 1519 (1987) (extending *Younger* abstention to its outer limits). Ultimately, a bizarre set of circumstances could develop in which a federal district court abstains from granting an injunction in favor of an asserted federal right, only later to find the Supreme Court presuming jurisdiction over the same case because it feels the state court has granted rights that are too extensive.

148. 28 U.S.C. § 1257(1), (2) (1983). *See also* Creswill v. Grand Lodge Knights of Pythias, 225 U.S. 246, 261 (1912) (noting the Court's duty to review state court decisions holding against a federal right).

149. *See* U.S. CONST. art. VI, cl. 2. *See also* Chicago, Burlington & Quincy Ry. v. Illinois *ex rel.* Drainage Comm'rs, 200 U.S. 561 (1906). "[T]his court will decide the Federal question if the necessary effect of the judgment is to deny a Federal right or immunity . . . which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law." *Id.* at 580.

150. *See* Michigan v. Long, 463 U.S. 1032, 1069 (1983) (Stevens, J., dissenting).

151. *Id.*

The prevailing litigant had no interest in Supreme Court review since he won at the state level. Yet it is this class of state court winners, and *only*[152] these winners, who are affected by the Supreme Court's presumption of jurisdiction in ambiguous cases. The Supreme Court assumes jurisdiction and turns these state court winners into losers. The Court accomplishes this by granting a writ of certiorari to the state prosecutor or state officer who was unsuccessful in state court.[153] In almost every case heard by the Court under the neofederalist adequate state grounds doctrine, the Court has reversed a state court decision entered in favor of a criminal defendant or other person litigating against the state.[154] Today, it is a foregone conclusion when the Court grants certiorari under the adequate state grounds doctrine that it will reverse a state court decision that was in favor of an asserted federal right. For some litigants the neofederalist adequate state grounds doctrine has been, quite literally, the kiss of death.[155]

Assuring that one particular defendant is convicted is not of primary interest to the Court.[156] When the Court has taken jurisdiction under the *Long* doctrine ostensibly to correct a state court's erroneous interpretation of federal law, it has done so not where the state court was extending federal rights beyond Supreme Court precedent, but rather, where the state court was accurately applying existing precedent.[157] In each of these cases the Court has used its assumption of jurisdiction to strangle a federal right. The Court's use of its certiorari jurisdiction for the purpose of constricting individual liberties is an abuse of discretion.[158] The Court rightly frowns on legislative enactments that punish

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152. The doctrine has been extended to quasi-criminal cases. *See supra* note 146.

153. *Long*, 463 U.S. 1032.

154. An exception to the general rule does exist. *See* Caldwell v. Mississippi, 472 U.S. 320 (1985). *Caldwell* involved the procedural strand of the adequate state grounds doctrine. The defendant Caldwell successfully asserted that he had been denied a fair trial in the face of a prosecutor's assertion that failure to comply with state procedural rules acted as an adequate and independent bar to Supreme Court review.

155. *See* California v. Ramos, 463 U.S. 992 (1983).

156. *See* Magnum Import Co. v. Coty, 262 U.S. 159 (1923). "The jurisdiction to bring up cases by certiorari . . . was given for two purposes, first to secure uniformity of decision . . . and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort." *Id.* at 163. While the Court was specifically addressing the question of certiorari to the circuit courts of appeal, it later stated: "These remarks, of course, apply also to applications for certiorari to review judgments and decrees of the highest courts of States." *Id.* at 164.

157. In *Long*, for example, the Michigan court accurately applied the rule established in Terry v. Ohio, 392 U.S. 1 (1968). The Supreme Court took jurisdiction over the case not because the Michigan Court granted rights more extensive than the Supreme Court had granted, but because it wished to extend *Terry* "stop and frisk" searches to car searches.

158. *See supra* notes 131-35. It is clear that the purpose of certiorari was to protect rights, not to diminish them.

retroactively[159] and has been known to strike down as violative of due process state court decisions that have that effect.[160] Yet, under the *Long* doctrine, the Court has shown no compunction about subjecting litigants to new constructions of the Constitution[161] of which they could not possibly have had fair warning.[162]

B. Expediency, Political and Otherwise: A Major Factor Underlying the Court's Jurisdictional Policy

Ordinarily, whether justices hold that a current construction of the Constitution does not afford enough protection to a particular right or, as now seems to be the case, they hold too much protection is being afforded, they must wait until an appropriate case comes before the Court to express their views and establish new law. The vast majority of criminal cases in the Supreme Court ascend from state courts.[163] The current formulation of the adequate state grounds doctrine gives the Court much broader access to such cases. Therefore, one reason for establishing the doctrine appears to be to accelerate the process of bringing criminal cases before the Court. Now, it seems as though the Court simply reaches out and finds a state court that is applying the Constitution—regardless of whether it does so consistent with past precedent—and then installs a new limitation on individual liberties. The Court's new construction of the doctrine applies to the individual litigant directly involved, and also to other present or future unfortunates who attempt to invoke similar rights.[164]

This expedient means of transforming federal law must be quite attractive to the Court,[165] but it constitutes judicial activism on an unprecedented scale. While one might sympathize with the Court's impatience, judicial activism is to be discouraged.[166] A clear example of

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159. *See* U.S. CONST. art I, § 9. *See also Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866).

160. *See* Bouie v. City of Columbia, 378 U.S. 347, 350 (1964).

161. *Id.* at 352 (discussing unforeseeable judicial constructions of a statute).

162. *Id.*

163. *See* Michigan v. Long, 463 U.S. 1032, 1042 n.8 (1983).

164. This holds true to an even greater extent for litigants who initiate cases in federal courts. For them, there is no possibility that the court in question will extend greater rights than the United States Supreme Court. At least in state court there is always the possibility, however remote, that the state court will extend greater rights under the state constitution.

165. Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 103 (1978) (Stevens, J., concurring) ("whenever we are persuaded by reasons of expediency to engage in the business of giving legal advice, we chip away a part of the foundation of our independence and our strength").

166. Even the Warren Court, frequently accused of judicial activism, did not interfere in the operation of the local police power so long as the police action provided for the protection of rights to an extent not beneath the minimal level prescribed by the Constitution.

the Court's overanxiousness appears in *Illinois v. Gates*.[167] In its haste to narrow the fourth amendment, the Court erroneously certified for argument the following question:

> [W]hether the rule requiring the exclusion at criminal trial of evidence obtained in violation of the Fourth Amendment . . . should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment.[168]

Since the issue had not been properly raised or argued in the courts below, the Court apologized to the parties, dismissed the question, and proceeded to move on to the issue properly before the Court.[169] Just one year later, a majority ultimately concluded in *United States v. Leon*[170] that there *is* a good faith exception to the exclusionary rule.

Gates is also instructive in pointing out the jurisdictional turmoil that engulfed the members of the Court at this time. Justice Rehnquist dedicated nine pages of the majority opinion to a discussion of the Court's jurisdiction over such cases.[171] Justice White concurred in a lengthy separate opinion contending that the Court had jurisdiction to decide the issue of whether a good faith exception should be created. He noted that the majority's finding that the Court lacks jurisdiction over the issue merely "defer[s]" a decision on the good faith exception to a later date.[172] The extensive discussion and apology by Justice Rehnquist amount to little more than an invitation to state prosecutors to raise the issue that ultimately was decided in *Leon*. Like the cases discussed in this Comment, both *Leon* and *Gates* came about because the respective state courts granted greater rights than the United States Supreme Court was willing to allow. While the state court judgments rested solidly within existing precedent, the Supreme Court granted writs of certiorari to state prosecutors to deny individual liberties.

Taking jurisdiction over ambiguously decided cases is an expeditious way of establishing precedent. Ironically, the Court's decisions in these kinds of cases may not bind the state courts to which they are directed.

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167. 462 U.S. 213 (1983). *See also* Colorado v. Connelly, 474 U.S. 1050, 1050 (1986) (memorandum of Brennan J.) (citing the Court's "unseemly eagerness to act as 'the adjunct of . . . prosecutors in facilitating efficient and expedient conviction.'") (quoting Wainwright v. Witt, 469 U.S. 412, 463 (1984) (Brennan, J., dissenting).

168. *Gates*, 462 U.S. at 217.

169. *Id.*

170. 468 U.S. 897 (1984).

171. *Gates*, 462 U.S. at 217-24.

172. *Id.* at 252 (White, J., concurring). Concern about a possible "delay" in deciding this issue indicates that Justice White considers expediency to be a jurisdictional factor.

This is true since the state court always has the option of extending greater rights under the state constitution than the Supreme Court is willing to grant under the Federal Constitution.[173] However, they are binding on all federal courts.[174] They are also binding on all other state courts that cannot,[175] or will not, extend individual rights beyond the minimal level established by the Court's decisions.

There are a variety of political forces that keep state courts from extending greater rights than the Supreme Court's interpretation of the Constitution will allow. Probably the biggest factor is that state court judges are typically elected and do not share the life tenure of their federal counterparts. Some state courts have been limited in the rights they can extend by state legislative action. The Supreme Court has encouraged state legislatures to take such action. One example of this appears in the amendment to the Florida State Constitution providing that the state's search and seizure provision will be interpreted consistent with United States Supreme Court interpretations of the fourth amendment.[176] This referendum followed holdings by the Supreme Court of Florida that the Florida Constitution afforded greater protection against unlawful search and seizure than did the United States Constitution.[177] While the Florida constitutional amendment is not attributable to the Supreme Court, it is interesting to note that not long after the amendment was passed, Justice Burger in *Florida v. Casal*[178] applauded the state's efforts to get its judiciary under control, extolling the virtues of "rational" law enforcement.[179]

A more startling example of political intervention by the Supreme Court involved a series of events in California which were at least partially attributable to the Supreme Court's decision in *California v. Ramos*.[180] In 1972, the California Supreme Court, long known for extending broad individual rights, struck down the state's death pen-

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173. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980) (Rehnquist, J., writing for the majority); Cooper v. California, 386 U.S. 58, 62 (1967).

174. *See* U.S. CONST. art. VI, cl. 2.

175. *Id.*

176. FLA. CONST. art. I, § 12 (as amended by referendum Nov. 2, 1982).

177. *See, e.g.*, State v. Dodd, 419 So. 2d 333 (Fla. 1982) (exclusionary rule is applicable in probation proceedings); Adoue v. State, 408 So. 2d 567, 577 (Fla. 1981) (Sundberg, C.J., concurring in part and dissenting in part); Hoberman v. State, 400 So. 2d 758 (Fla. 1981); State v. Sarmiento, 397 So. 2d 643, 645 (Fla. 1981); Grubbs v. State, 373 So. 2d 905, 909 (Fla. 1979).

178. 462 U.S. 637 (1983) (Burger, C.J., concurring). Only one year before the decision in *Long*, the Court denied certiorari in *Casal* because the decision was based on an independent and adequate state ground. Justice Burger was clearly disappointed with that result. Today's Court would not deny certiorari so readily.

179. *Id.* at 639.

180. 463 U.S. 992 (1983).

alty.[181] Soon thereafter the United States Supreme Court struck down the death penalty in *Furman v. Georgia*.[182] Later that year, the California Legislature responded by amending its constitution to provide for enforcement of all existing death penalty laws.[183] In 1978, the Briggs Instruction was passed which significantly broadened the existing law.[184] The California court never struck down the death penalty law but it did whittle away at portions of the Briggs Instruction passed in 1978. One of the California court's more significant decisions in that regard was *People v. Ramos*.[185] Defendant Ramos challenged the Briggs Instruction which allowed judges to instruct juries in death penalty cases concerning the governor's power to commute or pardon persons who received a death sentence.[186] The California Supreme Court struck down the instruction on the basis that it gave the jury a false impression about the possibility of gubernatorial intervention.[187] Meanwhile, a host of conservative political organizations were stirring California voters to vote certain state supreme court justices out of office.[188] The conservative dissatisfaction centered around the state supreme court's decisions regarding the death penalty.[189] In the midst of this turmoil, the United States Supreme Court took certiorari from the California State Prosecutor in the *Ramos* case.

Political motives aside, it is not clear why the Court chose to hear this case. The Briggs Instruction was unique to California law. The Court could not enter a decision that would bind other states.[190] The decision in *People v. Ramos* was clearly based on adequate and independent state law. Given the uniqueness of the Briggs Instruction, no relevant United States Supreme Court precedent existed. The primary factor mitigating against an assumption of jurisdiction was the California Supreme Court's long history of independence[191]—particularly with

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181. People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972).

182. 408 U.S. 238 (1972).

183. CAL. PENAL CODE § 190.3 (West 1988).

184. Codified at CAL. PENAL CODE § 190.3 (West 1988).

185. 30 Cal. 3d 553, 639 P.2d 908, 180 Cal. Rptr. 266 (1982), *on remand*, 37 Cal. 3d 136, 689 P.2d 430, 207 Cal. Rptr. 800 (1984).

186. *Id.* at 590-91, 639 P.2d at 929-30, 180 Cal. Rptr. at 289-90.

187. *Id.* at 591, 639 P.2d at 930, 180 Cal. Rptr. at 290.

188. *See* Wold & Culver, *The Defeat of the California Justices: the Campaign, the Electorate, and the Issue of Judicial Accountability*, JUDICATURE, Apr.-May 1987, at 348; Reidinger, *Death in California*, A.B.A. J., Jan. 1, 1988, at 106; Reidinger, *The Politics of Judging*, A.B.A. J., Apr. 1, 1987, at 52.

189. *See* Wold & Culver, *supra* note 188.

190. *See* People v. Ramos, 30 Cal. 3d 553, 591, 639 P.2d 908, 930, 180 Cal. Rptr. 266, 288 (1982) (noting that California was the only state with anything similar to the Briggs Instruction).

191. *See, e.g.*, Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980); California v. Krivda, 409 U.S. 33 (1972).

regard to issues concerning the death penalty. Nonetheless, the Supreme Court found the California Supreme Court decision ambiguous as to whether it rested on federal or state law, and reversed. The Court found that the Briggs Instruction did not conflict with the Federal Constitution and invited the California court to extend broader rights under the state constitution if appropriate.[192]

In view of the political climate that prevailed in California, the Supreme Court must have been aware that the members of the California court would be limited in their discretionary power to act independently of the United States Supreme Court's decision. Nonetheless, the California Supreme Court used its discretion to reverse the United States Supreme Court's decision in *Ramos*.[193] That action proved to be a pyrrhic victory for the California justices. In the subsequent election campaign the decision was cited as one of the three worst ever entered by the justices.[194] Ultimately, three California justices, including Chief Justice Rose Bird, were defeated in their bid for reelection.[195] The United States Supreme Court's decision in *Ramos* undoubtedly accelerated their defeat. It has been noted since that "[a]t a time when other state high courts are charting courses independent from that of the United States Supreme Court, the California Supreme Court now seems inclined, at least in its death penalty decisions, to toe the line laid down by the High Court."[196] The United States Supreme Court no longer hesitates to advise the California justices about how they should decide cases. In *Tison v. Arizona*,[197] the Supreme Court indicated that an earlier California Supreme Court decision, *Carlos v. Superior Court*,[198] holding that felony murderers could not be executed absent an intent to kill, was in error. In *People v. Anderson*,[199] the California Supreme Court reversed *Carlos*, citing the United States Supreme Court's decision in *Tison*. However, in an interesting twist, the California court granted Anderson a new trial. The basis for the order was the Rose Bird court's final decision in *People v. Ramos*.[200] The judge in *Anderson* had given the jury a Briggs Instruction which is still forbidden by the California Constitution. Thanks to *People v. Ramos*, the *Anderson*

192. California v. Ramos, 463 U.S. 992, 997 n.7 (1983).

193. 37 Cal. 3d 136, 159, 689 P.2d 430, 444, 207 Cal. Rptr. 800, 814 (1984).

194. *See* JUDICATURE, Apr.-May 1987. (Cover depicts a campaign flyer describing *Ramos* as one of the court's worst decisions because it "struck down the death penalty").

195. Reidinger, *Death in California*, A.B.A. J., Jan. 1, 1988, at 106.

196. *Id.*

197. 107 S. Ct. 1676 (1987).

198. 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983).

199. 742 P.2d 1306, 240 Cal. Rptr. 585 (1987).

200. *See supra* notes 185-92 and accompanying text.

decision is totally grounded in state law and unassailable by the United States Supreme Court.

Whether its purpose is to transform state criminal law or to project a particular political posture, when the underlying policy of the United States Supreme Court is expediency, principles are little more than illusions. The ultimate result can only be a decline in respect for the Court[201] with the resulting danger that the power of the Court's decisions will be diminished.

IV. WHAT WILL THE FUTURE BRING?

The key adequate state grounds case of *Michigan v. Long*[202] was a moderately strong 6-3 decision on the substantive constitutional issue. Technically, it was a weaker 5-4 decision on the jurisdictional question. This is misleading, however, because while Justice Brennan did not formally concur with the majority on the new jurisdictional policy, he did indicate in a footnote his agreement with the majority's position on that issue.[203] This is surprising given that his is usually considered a solid vote in favor of individual liberties.[204] The rationale behind his position is not entirely clear, and the possible reasons suggested here are admittedly pure speculation. It may be his belief that the current willingness by the Court to take jurisdiction over close cases will make it easier for a more liberally disposed Court to override the objections of justices asserting that an independent and adequate state ground exists. He may also feel that should state courts adopt his suggested approach—extending greater rights under state constitutions than the Supreme Court has allowed under the Federal Constitution, the plain statement requirement of *Long* would effectively insulate their decisions from Supreme Court review.[205] This rationale ignores the fact that state court judges are often subject to political pressures and, therefore, may be less inclined to expand individual liberties.[206] It also ignores the fact that a politically motivated Supreme Court might, again, alter the adequate state grounds doctrine. This could easily happen if the doctrine were seen as no longer serving its present purposes.

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201. Clear evidence of this exists in the positions taken by authors of law review articles on the subject. *See, e.g.*, Seid, *supra* note 61, at 72-73.

202. 463 U.S. 1032 (1983).

203. *Id.* at 1054 n.1 (Brennan, J., dissenting).

204. The clearest evidence of this appears in *Long* itself. Justice Brennan's dissent was based on his desire to uphold the defendant's right against unreasonable search and seizure.

205. *See* Welsh, *supra* note 99, at 1126-28 (discussing the unreviewable state court decision). *See also* Brennan, *The Bill of Rights and The States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986) (arguing for the independence of state constitutions).

206. *See supra* notes 176-84 and accompanying text.

Another possible factor may be Justice Brennan's well-known and long standing opposition to the death penalty.[207] He may perceive, as others have, that *Michigan v. Long*, if fully extended into the area of the procedural adequate state grounds doctrine, would eliminate the hurdles of procedural default that so often bar death sentenced individuals from asserting their federal rights. It would do so by substituting the *Long* presumption of jurisdiction[208] for the *Wainwright v. Sykes* requirement that a defendant must show cause for failure to comply with state procedural rules together with actual prejudice resulting from the alleged constitutional violation.[209]

Caldwell v. Mississippi[210] represents one such application of *Long*; it also represents the only instance this author is aware of in which the neofederalist adequate state grounds doctrine has been applied to vindicate a federal right. Application of the doctrine to federal habeas corpus proceedings could have even broader implications, applying the presumption of jurisdiction to all cases in which the convicted state prisoner seeks to assert a federal right.[211] While seemingly willing to go along with the majority for the present, Justice Brennan has not been an outspoken supporter of the Court's policy, at least not in the context of a case opinion.[212] His attitude could change if the current trend continues and his possible expectations for the doctrine fail to develop.

Justice O'Connor also presents a position that is difficult to assess. As the author of many of the Court's recent jurisdiction expanding cases, including *Michigan v. Long*,[213] she has indicated consistently that

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207. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 305 (1972) (Brennan J., concurring) (finding that the death penalty violates the eighth amendment's prohibition against cruel and unusual punishment).

208. *See* Robson & Mello, *supra* note 88.

209. Wainwright v. Sykes, 433 U.S. 72, 87 (1977). The Court also noted that there was an "independent and adequate state procedural ground which would have prevented direct review here." *Id.* One is left to wonder why the Court heard the case if there was an independent and adequate state basis for the decision. The only likely answer is that the Court needed the *Sykes* case, since it presented an opportunity to cut back on the more liberal review standards of Fay v. Noia, 372 U.S. 391, 437 (1963). *See supra* note 116.

210. 472 U.S. 320 (1985).

211. *Sykes*, together with *Caldwell*, presents these possibilities. *Sykes* was not a direct review case but arrived at the Supreme Court through the lower federal courts where the defendant had sought relief by way of habeus corpus. The case is discussed by the Court as both a direct review type procedural adequate state grounds case and as a procedural default case. However, the case predates *Long* and one must, therefore, recognize the importance of *Caldwell v. Mississippi*. That case extends *Long*'s presumption of jurisdiction to the procedural adequate state grounds area. It is only a step from there to extend the presumption to habeas corpus cases involving procedural default. *Sykes* is significant in that respect because it indicates that cases involving habeus corpus-procedural default can be treated in the same way as procedural adequate state grounds cases. *See* Robson & Mello, *supra* note 88, at 109.

212. Michigan v. Long, 463 U.S. 1032, 1054 (1983) (Brennan, J., dissenting).

213. 463 U.S. at 1034.

the doctrine presented in *Long* is not written in stone.[214] She seems to leave the door open to change position should the neofederalist *Long* doctrine prove ineffective in eliminating jurisdictional problems. About the doctrine she has said, "Notwithstanding the advantages of the rule, I must add a word of caution about *Michigan v. Long*. The Court did not adopt this rule unanimously. It will take time to see whether the principle *Michigan v. Long* adopts will serve our judicial federalism well."[215] Interestingly, Justice O'Connor was also the author of the Court's opinion in *South Dakota v. Neville*.[216] She likely views the outcome of that case as a personal disaster. Should such results continue to occur, she might eventually change her position on the adequate state grounds issue. While her overall record indicates that she does not place the vindication of individual liberties high on her priority list, several recent opinions indicate that her attitudes in this area may be shifting.[217] She has gradually risen to a position of seniority[218] and could ultimately lead the Court away from its present policy just as she originally led it in that direction.

Justice Stevens has been the strongest and most consistent opponent of the Court's presumptive jurisdictional policy. He has written many eloquent dissents on the subject,[219] and his position in this regard is unquestioned. He is joined by Justice Marshall.

The other justices on the Court apparently remain staunch supporters of the current doctrine. Even assuming that the Court's latest addition, Justice Anthony Kennedy, proves to be opposed to the doctrine and Justices Brennan and O'Connor change their current positions, a majority could not be mustered to prevent the Court from presuming jurisdiction over ambiguously decided cases.

A more interesting and more likely reason for alteration or abandonment of the Court's policy would be an unwillingness on the part of state courts to go along with the Supreme Court's plain statement requirement. A possible perception of state court judges, who are aware of the change in the Court's jurisdictional policy, is that it has resulted in only moderate reductions in individual liberties. Many state court

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214. *Id.* at 1041 n.6.

215. O'Connor, *supra* note 27, at 8.

216. 459 U.S. 553 (1983).

217. *See* United States v. Stanley, 107 S. Ct. 3054, 3065 (1987) (O'Connor, J., dissenting); Miller v. Florida, 107 S. Ct. 2446, 2453 (1987); Illinois v. Krull, 107 S. Ct. 1160, 1173 (1987) (O'Connor, J., dissenting).

218. Justice O'Connor is now ranked fifth in seniority on the Court. At least three Justices, Brennan, Marshall, and Stevens, can be expected to retire within the next few years.

219. *See, e.g.*, Michigan v. Long, 463 U.S. 1032, 1065 (1983) (Stevens, J., dissenting); California v. Ramos, 463 U.S. 992, 1029 (1983) (Stevens, J., dissenting).

judges may truly have believed that they were compelled by the Supreme Court's interpretation of the Federal Constitution to grant more extensive rights, particularly to criminal defendants, than they would have preferred. Should an increasingly conservative Court make wider and deeper inroads into individual liberties, respect for the Court is likely to decline and consequently, negative responses from state courts are likely to increase.[220] There are likely to be more majority opinions along the lines of the dissent authored by Justice Shea in *State v. Jackson*.[221] In his dissent, Justice Shea rejected the Supreme Court's decision in *Neville*,[222] which held that admitting a defendant's refusal to submit to a blood-alcohol test into evidence is not a violation of his right against self-incrimination. Theoretically, a state court could issue a per curiam opinion simply stating that the Supreme Court has issued an unconstitutional advisory opinion which the state court chooses to ignore and that its original decision was based on an obviously independent and adequate state ground.[223] It is difficult to speculate on the level of disrespect the Supreme Court would be willing to tolerate before altering its policy, but a prolonged or deep-seated response could have severe negative consequences for our federalist system.

V. A PRAGMATIC APPROACH FOR THE PRACTICING ATTORNEY

The implications of *Long* for the practicing attorney are substantial. As unwise and inappropriate as it might be, it shows no signs of being abandoned in the near future. For that reason, this Comment would be incomplete without some suggestions on how to avoid the doctrine's pitfalls.

Since questions not raised at the trial level usually cannot be raised on appeal, it is important for the trial lawyer to argue legal points on both federal and state grounds. This approach safeguards both avenues of argument for appeal. Where possible, an attorney on appeal should be careful to point out those situations in which precedent has estab-

220. Recently, the Court's application of the adequate state grounds doctrine to expedite its program of modifying state criminal law has slowed. There have been fewer such decisions than in the peak years of the early eighties. It could be that the Court is simply reaching the limits of its conservative agenda. If that is the case, perhaps the *substantive* adequate state grounds doctrine will be of diminishing significance. Instead, the presumption of jurisdiction in ambiguously decided cases may prove to be of increasing importance in the *procedural* adequate state grounds area.

221. 206 Mont. 338, 351, 672 P.2d 255, 261 (1983) (Shea, J., dissenting).

222. *See* South Dakota v. Neville, 459 U.S. 553 (1983). This was certainly a case in which the state court controlled the final outcome.

223. *Id. Neville* was not a per curiam opinion, but it came close to the scenario described here.

lished that a position being argued constitutes an independent and adequate state ground for decision. A court predisposed to a favorable ruling is likely to welcome the opportunity to present that ruling in a fashion that safeguards it from review by the United States Supreme Court. For the same reason, it would be wise to suggest to the state appellate court that it has the power to grant greater rights under the state law than federal law, provided the Court makes clear that its decision is based on an independent and adequate state ground. This is true even though the state court may not have shown an inclination to do so previously. Many state courts have not firmly established an approach to dealing with the Court's new jurisdictional policy, and no harm is done by suggesting an approach favorable to individual liberties.

While it is important to bring the possibility of ruling on an independent and adequate state ground to the court's attention, it is equally important to continue to present issues as a matter of federal law as well. Should the court ultimately rule against the asserted federal right, the attorney, by arguing federal law, preserves the right of appeal to the United States Supreme Court. This is true even where the state court asserts that it has ruled against the federal right on an independent and adequate state ground basis.

Attorneys faced with procedural default problems, either on direct review by the United States Supreme Court or in the context of a petition for habeas corpus, should take full advantage of the presumption of jurisdiction created in the substantive adequate state grounds area. They should be able to argue successfully that *Caldwell v. Mississippi*[224] extends the rule to the procedural adequate state grounds area and that *Wainwright v. Sykes*[225] creates a logical nexus between habeas corpus and procedural adequate state grounds. But beware the language in *Sykes*, indicating that procedural and substantive cases have traditionally been treated differently.

VI. CONCLUSION

This Comment has examined each of the principles put forward by the Supreme Court as a basis for its recent neofederalist formulation of the adequate state grounds doctrine. At each stage of the discussion questions have been posed: How can the Court assert federalism as the basis for a policy so clearly opposed to the father of federalism, James Madison? How can it assert that a doctrine bringing prosecutorial petitions to the Supreme Court in astounding numbers is actually an aid to

224. 472 U.S. 320 (1985).
225. 433 U.S. 72 (1977).

docket control? Why should uniformity of federal law be a more significant factor in jurisdictional decisions than the redress of rights particularly in the context of a dualistic doctrine that grants one standard of review to state prosecutors and a different, tougher, standard to defendants facing procedural default? How can one reconcile the current formulation of the adequate state grounds doctrine with the court's other neo-federalist policies? Where is the common thread that binds all of these questions together to present a consistent picture of the Court's jurisdictional policies?

In an attempt to answer these questions the author asserts that the present Court is uncomfortable with the breadth of individual liberties, both those granted by state courts and by past Supreme Court decisions. The thread of consistency in all of the Court's policies is found not in its rhetoric but in the practical impact of its decisions—the narrowing of individual liberties. For that reason, the author argues that the Court's current formulation of the substantive adequate state grounds doctrine—presuming jurisdiction in ambiguously decided cases—should be abandoned. The Court should also abandon its policy of granting certiorari to state prosecutors. No policy interest is served by reversing state decisions that uphold a federal right. In the context of the procedural adequate state grounds doctrine, a state procedural rule should never take precedence over an asserted federal right. The neofederalist presumption of jurisdiction has some application in ambiguously decided cases involving questions of procedural default; but, logically there should be a presumption of jurisdiction in all such cases whether ambiguously decided or not.

More than any other factor, the purpose of federalist government is to provide for the rights of its citizens. When it fails in that purpose, it fails utterly. Madison's retort to the anti-federalists is as true today as it was when he authored it: "the ultimate authority . . . resides in the people alone . . . it will not depend merely on the comparative ambitions or address of different governments, whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of the other."[226]

226. THE FEDERALIST NO. 46, *supra* note 12, at 322.